BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

In the Matter of		
	Dockets	**OST-97-2881**
COMPUTER RESERVATION SYSTEM		**OST-97-3014**
(CRS) REGULATIONS		**OST-98-4775**
		OST-99-5888

ANSWER OF NORTHWEST AIRLINES, INC.

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Dated: January 13, 2003

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Northwest opposes Sabre's obvious ploy to delay this proceeding and maintain the status quo by requesting an oral hearing. Neither the Administrative Procedure Act ("APA") nor the Department's rules require an oral hearing in rulemaking proceedings. Commencing a hearing here would not only be inconsistent with the Department's practice in previous Computer Reservations System ("CRS") rulemakings, but also would frustrate the public interest in concluding this proceeding expeditiously. The Department should deny Sabre's request and bring the CRS rulemaking to a close as soon as possible.

In support of its position, Northwest states as follows:

1. The Procedure Adopted By DOT In This Case Is Consistent with the APA and Previous CRS Rulemakings

When the Department issued its Notice of Proposed Rulemaking ("NPRM") in this proceeding, it said it would follow "the notice and comment procedures established by the [APA] for informal rulemaking," as the Department and the Civil Aeronautics Board ("CAB") "have done in all of our CRS rulemakings."[1] Sabre's belated call for an oral evidentiary hearing here disregards those precedents and the judicial authority which Sabre itself cites.

The CAB rejected similar arguments about the need for an oral evidentiary hearing in the original CRS proceeding, and the Seventh Circuit Court of Appeals agreed, recognizing that the APA "makes clear that notice of the scope and general thrust of the proposed rule, and an opportunity to submit written comments, are all the procedure that an agency engaged in 'informal rulemaking' is required to provide."[2] In the original rulemaking, American and United tried to characterize the rulemaking proceeding as an adjudicative proceeding, as Sabre does here, and argued "that the Board cannot gather such adjudicative facts without affording them the opportunity to rebut or explain evidence." Order 83-10-74 at 3 In upholding the Department's refusal to hold an oral hearing, the Seventh Circuit found that, "the weight of authority, much of it in the Supreme Court and therefore beyond our power to reexamine, is overwhelming against forcing an

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1 67 Fed. Reg. 69366, 69369 (November 15, 2002).

2 United Air Lines, Inc. v. C.A.B., 766 F.2d 1107, 1116 (7th Cir. 1985).

administrative agency to hold an evidentiary hearing to resolve disputed questions of antitrust fact."[3]

The Department has also refused to hold oral hearings in CRS adjudications. For example, the Department denied Iberia's request for an oral hearing and proposed sanctions against the Spanish airline for withdrawing from Sabre in an enforcement case brought by American under the International Air Transportation Fair Competitive Practices Act ("IATFCPA"), as amended. See Order 90-6-21. Accord, Order 88-9-3 (denying Japan Air Lines' request for a hearing in an enforcement case involving alleged restrictions on Apollo sales in Japan).

Granting a hearing here would, therefore, be contrary to DOT precedent and policy.[4]

2. The Department Has Rejected Other Requests for an Oral Hearing

Sabre argues that fact hearings at the Department are often requested when complex questions are at issue and claims that its interests are similar to those of parties which have sought oral hearings in "airline alliances international air service proceedings and citizenship issues."[5] None of those requests for a hearing has succeeded, however, and they further undermine Sabre's request.

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[3] 799 F. 2d at 1119.

[4] Sabre cites Delta Air Lines, Inc. v. CAB, 561 F.2d 293, 312 (D.C. Cir. 1977), in support of its argument that a fact hearing is required in this rulemaking, but that case involved an adjudication and the court case said only that a party in that adjudicative context needed "a chance to submit its own version of changes in circumstances . . . and to comment upon the relevance of those changes." 561 F.2d at 306.

[5] Sabre Petition at 20.

Contrary to Sabre's assertion, for example, the Department only agreed to permit oral arguments in the first American/British Airways alliance case. The Department concluded there that an adequate record did not require cross-examination and other formal hearing procedures.[6] More recently, when the Department denied a request from Northwest and others for an oral hearing in the second American/British Airways alliance case, the Department "note[d] that the importance and even complexity of issues, including factual issues, do not automatically imply that oral evidentiary procedures are necessary. . . . We have routinely decided factual issues involving economic and policy questions in other cases of similar complexity without a formal hearing."[7] The Department no longer conducts oral hearings in contested international route cases or citizenship cases. Indeed, most citizenship cases are conducted informally, as non-public proceedings.

Thus, the examples of previous requests for hearings provide no basis for granting Sabre's request.[8]

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[6] See Order 98-7-23 at 8-9; Order 97-9-4 at 17.

[7] Order 2001-12-5 at 3.

[8] The judicial authority cited by Sabre is similarly unavailing. For example, in Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), the Court said that "a court may not impose additional procedural requirements upon an agency." 463 U.S. at 50, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978). While Sabre argues that International Harvester v. Ruckleshaus, 478 F.2d 615, 631 (D.C. Cir. 1973), requires an oral hearing here to develop the Department's prospective CRS policy, that case involved an agency's denial of applications for relief available under a statute, an adjudicative situation not present here. Sabre's reliance on NRDC v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985), is also misplaced, since that case involved a statutory requirement that an energy program be based on "current technology."

3. An Oral Hearing is Unnecessary and Would Substantially Delay This Rulemaking

The crux of Sabre's argument is that an oral hearing is necessary to resolve purported "disputed material facts" and to correct or supplement "stale, omitted and erroneous material "facts." As explained above, the courts have consistently held that no such hearing is required to decide antitrust facts like those about which Sabre is concerned. In any event, most of the questions which Sabre attempts to classify as "fact issues" are really policy questions, legal issues or predictions about the future state of the airline distribution industry and competition, all of which Sabre and other parties can readily address in written comments. Just a month ago, Sabre and other petitioners asked for more time to address those same issues in their written comments, without any indication that an oral hearing was necessary.[9] The Department granted Sabre's request in its entirety and extended the comment period by three months. Thus, Sabre has more than sufficient time to address these so-called fact questions in its written comments.

Sabre's claim that the hearing procedures it seeks "need not delay" this proceeding is absurd. Although Sabre does not explain how its proposed oral hearing would be coordinated with the written comment period now scheduled to end on May 15, the oral procedure Sabre outlines would clearly continue well beyond that date. The cross-examination of witnesses alone, which Sabre says is "critical" to its proposal, would take months, since multiple parties would have to be given an opportunity to question each witness.

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[9] See Petition of Sabre and others, dated November 22, 2002.

Sabre has just imposed its seventeenth consecutive annual fee increase, which is higher (at approximately 3%) than the current rate of inflation. Prolonging the status quo with the lengthy oral hearing requested would permit Sabre and other CRSs to continue imposing such unreasonable increases on airline participants.

4. The Data Quality Act Provides No Basis for a Hearing

There is no basis for Sabre's assertion that the Data Quality Act ("Act") requires a fact hearing. That Act requires the Department to issue guidelines under the Act, which it has done, and provides that the rulemaking process should be used to respond to Sabre's request for correction of information. Under those guidelines, "When the Department seeks public comment on a document and the information in it (e.g., a notice of proposed rulemaking (NPRM) . . .), there is an existing mechanism for responding to a request for correction." [10] In any event, the guidelines make clear that "[t]hey are not intended to be, and should not be construed as, legally binding regulations or mandates."[11]

Thus, a fact hearing is not the appropriate forum for Sabre to raise concerns about the Department's data in this rulemaking proceeding. Sabre is, of course, free to submit comments on the Department's Notice of Proposed Rulemaking to raise those concerns. Alternatively, as indicated above, Sabre can submit corrections at any time for inclusion in the record.[12]

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[10] DOT Information Dissemination Quality Guidelines ("Guidelines"), October 1, 2002, at 24.

[11] Guidelines at 13.

[12] Sabre's assertion that the APA requires inclusion of the Department's 1994/95 study on CRS practices cannot be reconciled with Sabre's criticism of the Department for relying on stale and out-of-date data.

Conclusion

Any further delay of this long-overdue rulemaking would be at odds with Secretary Mineta's pledge to make "completion of this rulemaking proceeding a departmental priority."[13] The Department should deny Sabre's request for an oral hearing and should conclude this proceeding as swiftly as possible.

Respectfully submitted,

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January 13, 2003

[13] Letter from Secretary Norman Y. Mineta to Congressman James L.Oberstar, dated November 5, 2002.

CERTIFICATE OF SERVICE

On this 13th day of January, 2003, a copy of the foregoing Answer of Northwest Airlines, Inc. was served by first class mail, or a more expeditious means, on the following parties as shown below:

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